STATE OF MICHIGAN

COURT OF APPEALS

RUDY LOZANO, Personal Representative of the Estate of JON ALEXANDER JARZEMBOWSKI, Deceased,

Plaintiff-Appellee,

v

DETROIT MEDICAL CENTER and HARPER-HUTZEL HOSPITAL, d/b/a HARPER HOSPITAL,

Defendants,

and

DR. ALFREDO LAZO and DR. L. REYNOLDS ASSOCIATES, P.C.,

Defendants-Appellants.

UNPUBLISHED
December 2, 2008

No. 279087
Wayne Circuit Court
LC No. 05-504343-NH

RUDY LOZANO, Personal Representative of the Estate of JON ALEXANDER JARZEMBOWSKI, Deceased,

Plaintiff-Appellee,

v

DETROIT MEDICAL CENTER and HARPER-HUTZEL HOSPITAL, d/b/a HARPER HOSPITAL,

Defendants-Appellants,

and

DR. ALFREDO LAZO and DR. L. REYNOLDS ASSOCIATES, P.C.,

No. 279090
Wayne Circuit Court
LC No. 05-504343-NH

Defendants.

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

In these consolidated interlocutory appeals, defendants appeal by leave granted the trial court's order that, among other things, required defendants' expert witnesses to be available on the first day of trial to testify in plaintiff's case-in-chief. We reverse.

I. Background

Plaintiff alleged that defendant Dr. Alfredo Lazo negligently performed a coiling procedure to treat a vascular aneurysm on plaintiff's decedent, Jon Jarzembowski, which led to Jarzembowski's death. Plaintiff alleged that the other defendants were vicariously liable for Dr. Lazo's negligence. In preparation for trial, plaintiff subpoenaed defendants' expert witnesses, Drs. In Sup Choi, John Wald, and William Sanders, in order to secure their testimony for trial.[1] Defendants filed motions to quash the subpoenas on the ground that plaintiff could not compel by subpoena their expert witnesses to involuntarily testify on plaintiff's behalf. Defendants asserted that their expert witnesses held a proprietary interest in their own opinions and that the experts could not be compelled by subpoena to disclose their opinions in court. The trial court agreed and quashed plaintiff's subpoenas. However, after defendants acknowledged that they intended to call their expert witnesses at trial, the court ruled that plaintiff was entitled to call defendants' expert witnesses during his case-in-chief as adverse witnesses. It therefore required defendants' expert witnesses to be available on the first day of trial. The court later clarified that it was not requiring that defendants' experts be physically present on the first day of trial, only that they be available to testify when called by plaintiff. This was particularly problematic for Dr. Choi, who resided in Massachusetts.

When defendants questioned who would be required to pay for the experts' time for testifying during plaintiff's case-in-chief, the trial court declined to impose any responsibility for payment on plaintiff, reasoning that the situation would be no different than if the experts testified only in defendants' case-in-chief. The court further required that all examinations of defendants' experts, whether by plaintiff or defendants, would be conducted during plaintiff's case-in-chief. The court refused to allow any "bifurcation," meaning that defendants would not be permitted to separately call their expert witnesses in their own case-in-chief.

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[1] Drs. Choi and Wald are the expert witnesses for defendants Dr. Lazo and Dr. L. Reynolds Associates, P.C. Dr. Sanders is the expert witness for defendants Detroit Medical Center and Harper Hospital.

II. Adverse Witness Statute

Defendants argue that the trial court erred by ruling that plaintiff could call defendants' experts as adverse witnesses during plaintiff's case-in-chief.

The adverse witness statute, MCL 600.2161, provides:

> In any suit or proceeding in any court in this state, either party, if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true.

We review de novo questions concerning the interpretation and application of a statute. *Danse Corp v Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002). Clear statutory language is enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

The purpose of the adverse witness statute "is to permit calling the opposite party, or his agent or employee, as a witness with the same privileges of cross-examination and contradiction as if the opposite party had called that witness." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 26; 697 NW2d 913 (2005). It is a mechanism through which a party can obtain the testimony of a person who might not otherwise testify for the opposing party.

We agree with defendants that the plain language of the statute defines who qualifies as an adverse witness and that defendants' experts do not fit within any category set forth in the statute. The statute allows a party to call as an adverse witness either an opposing party, or an employee or agent of an opposing party. Defendants' expert witnesses are not parties to this action or employees of any defendant. Additionally, our Supreme Court has held that an independent medical expert is not an agent of the party who hired him for the purpose of obtaining his expert opinion. *Barnett v Hidalgo*, 478 Mich 151, 163 n 7; 732 NW2d 472 (2007).

This Court has repeatedly held that witnesses who are not party opponents or agents or employees of a party opponent cannot be called under the adverse witness statute. See, e.g., *In re Forfeiture of $19,250*, 209 Mich App 20, 28; 530 NW2d 759 (1995); *Davis v Wayne Co Sheriff*, 201 Mich App 572, 587; 507 NW2d 751 (1993); *Thompson v Essex Wire Co*, 27 Mich App 516, 530; 183 NW2d 818 (1970). Furthermore, it is well settled that an expert witness may not be compelled to provide involuntary testimony pursuant to a subpoena. See *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970) (recognizing that an expert "has a property right in his opinion and cannot be made to divulge it in answer to a subpoena"). Accordingly, the trial court erred by ruling that plaintiff was entitled to call defendants' expert witnesses as adverse witnesses during plaintiff's case-in-chief.

III. MRE 611

Although the trial court did not cite MRE 611 as authority for its decision, plaintiff asserts that this rule authorized the trial court to require defendants' experts to testify during plaintiff's case-in-chief.

MRE 611(a) provides in relevant part:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Under MRE 611, a trial court has broad power to control the manner in which witnesses are called and the mode and order of interrogation. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995).

Plaintiff argues that the trial court's ruling did not compel defendants' experts to testify, but simply changed the order in which their voluntary testimony was to be given, as permitted by MRE 611. We disagree. Even if defendants' experts had intended to voluntarily testify for defendants, the trial court's ruling did not merely allow defendants to call their witnesses out of turn, but rather required the witnesses to testify as part of plaintiff's own case-in-chief, for the purpose of allowing plaintiff to attempt to satisfy his own burden of proof. Although MRE 611 provides the trial court with discretionary authority to control the order in which permissible testimony is presented, it does not serve as a mechanism for allowing a party to secure testimony that the party is not otherwise permitted to present. While plaintiff certainly would be entitled to cross-examine defendants' expert witnesses once called by defendant, he had no legal right to compel the testimony of defendants' experts as part of his own case-in-chief, see *Klabunde*, *supra* at 282, or to call defendants' experts as adverse witnesses. Accordingly, MRE 611 does not provide a basis for upholding the trial court's decision.

For these reasons, we reverse the trial court's order requiring that defendants' expert witnesses be available to testify on the first day of trial and permitting plaintiff to call those witnesses as part of his case-in-chief. In light of our decision, it is unnecessary to address defendants' remaining arguments.

Reversed.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens